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Supreme Court, U.S.
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No. 86-

In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY SCHOOLER,
Petitioner,

vs.

ROBERT HARDER, Secretary of Social and Rehabilitation Services, and KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

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QUESTIONS PRESENTED

It has long been established that a tenured public employee may not be terminated without an adequate pre-termination hearing. In the recent case of *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), it was held that a tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. 470 U.S. at 546. Also, the propriety of the pre-termination procedures must be viewed in light of post-termination procedures available. (*Id.*)

The questions presented are:

1. Where a major reason for a proposed termination is the information provided by a particular witness, is a tenured public employee, whose termination is being proposed, entitled by due process to know the name of the witness against him within a reasonable time before the pre-termination hearing and are Kansas statutes which do not require that the name of such witness be given unconstitutional as applied to Petitioner?

2. Where the termination of a tenured public employee is proposed, and a major reason for the proposed termination is the information provided by a particular witness, is the tenured public employee entitled by due process to cross-examine this witness at the pre-termination hearing and are Kansas statutes which did not require pre-termination cross-examination of adverse witnesses unconstitutional as applied to Petitioner?

3. Where the termination of a tenured public employee is being proposed, is that employee entitled by due process to a degree of impartiality on the part of the administrator deciding the matter of his termination

at the pre-termination stage such that the result of the hearing is not a foregone conclusion and are Kansas statutes which did not require such impartiality of the pre-termination decision-maker unconstitutional as applied to Petitioner?

4. Where a tenured public employee's dismissal is proposed, and the factual contentions supporting the proposed dismissal and the names of adverse witnesses are not disclosed to the employee in the proposed dismissal letter, is a period of five days—over Labor Day weekend —sufficient time under due process for the employee to prepare for the pre-termination hearing, and are Kansas statutes which do not require a longer notice period unconstitutional as applied to Petitioner?

5. Where a tenured public employee's dismissal is proposed, and the administrator provides notice of said termination which only contains vague, general statements of the reasons for termination without giving specific information such as the time, place, and dates of instances leading to termination, is the tenured public employee entitled to know the specifics before the pre-termination hearing and are Kansas statutes which allow such vague, general reasons to be given at the pre-termination stage unconstitutional as applied to Petitioner?

6. In post-termination hearing procedures, before an impartial decision-maker, is a tenured public employee entitled to know in advance the specific evidence relied upon by the administrator (such as time, dates and places of relevant instances of conduct) in terminating him prior to the hearing in order to assure that defense can be prepared and are the procedures employed by the Kansas Civil Service Board, which denied Petitioner such specific information prior to the post-termination hearing, unconstitutional as applied to Petitioner?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Kansas Court of Appeals and the Kansas Supreme Court are listed in the caption of the case in this Court.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF KANSAS

The Petitioner, Gary Schooler, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Kansas entered in this proceeding on October 16, 1986.

OPINIONS BELOW

There are no official or unofficial reports of any opinions delivered in the courts or administrative agencies below. However, the nonpublished decisions of the District Court of Shawnee County, Kansas, the per curiam affirmance of such decision without opinion by the Kansas Court of Appeals, and the denial of Petition for Review by the Supreme Court of the State of Kansas are appended hereto. The opinion of the District Court of Shawnee County, Kansas, dated December 5, 1985, is

appended as Appendix B, the per curiam affirmance of the Court of Appeals of the State of Kansas, dated October 16, 1986, is appended hereto as Appendix A, and the denial of the Petition for Review by the Kansas Supreme Court, dated December 18, 1986, is appended hereto as Appendix C. The decision of the Kansas Civil Service Board and Denial of Rehearing are appended hereto at Appendix E and F, respectively.

JURISDICTION

The judgment of the Kansas Court of Appeals herein was entered on October 16, 1986. A Petition for Review to the Kansas Supreme Court was timely filed and this Petition for Review was denied on December 18, 1986. Jurisdiction is in this Court pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case arises under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A., Constitution, Amendment XIV.

Also, the case involves the issue of whether the statutory provisions governing termination of tenured public employees in Kansas, found at K.S.A. 75-2949(b), as interpreted by the Kansas Court of Appeals and applied to Petitioner, are unconstitutional under due process standards. K.S.A. 75-2949(b), as that statute existed at the time of Petitioner's termination, is reproduced at Appendix D hereto. It should be noted that this statute was amended in the session of the Kansas Legislature immediately following Petitioner's dismissal and now provides that the factual basis for termination must be provided to the tenured public employee in the proposed dismissal letter.

STATEMENT OF THE CASE

1. The petitioner worked at the Youth Center at Atchison, Kansas, since 1972 and never received an unsatisfactory evaluation. On August 28, 1984, Mark Phelps, Superintendent of the Youth Center at Atchison, Kansas, an employee of Respondents Robert Harder, Secretary of Social and Rehabilitation Services, and the Department of Social and Rehabilitation Services, had a general conversation with head cottage parent, Mrs. Loval Vigola, in his office. At that time, Vigola alleged to Superintendent Phelps that Petitioner Gary Schooler, who was also a head cottage parent at the Youth Center, had contacted her at home and informed her that he would be transferred on September 18 and was asking his staff, and his wife, Glenice Schooler, was asking her staff, to call the Youth Center at Topeka asking for a lateral transfer. Vigola alleged that, in this conversation, Mr. Schooler stated that if enough people were to call the Youth Center at Topeka (hereinafter YCAT) the state might attempt

to find out what was going on at the Youth Center at Atchison. Vigola alleged that this phone call took place in the late afternoon of August 20, 1984. (TR.,[1] Volume II, Testimony of Mark Phelps, Pages 437, 438, 439.)

2. Upon these allegations from Vigola, Superintendent Phelps contacted Robert Nye, Director of the Youth Services, and asked him to do an investigation into the matter. (TR., Volume II, Testimony of Mark Phelps, Page 440.)

3. After undertaking this assignment, Mr. Nye called back within "a few hours" and said that he obtained a written statement from Mrs. Vigola concerning the incident. Thereupon, a meeting was held between Phelps, Nye, and Kearns to discuss the situation. (TR., Volume II, Testimony of Phelps, Pages 440, 441.)

4. Also, on or about August 28, 1984, Phelps contacted all department heads of the Youth Center at Atchison and solicited their general comments about Petitioner. (TR., Volume II, Testimony of Phelps, Pages 466 and 467.)

5. Before Petitioner's proposed termination letter was issued on August 29, 1984, Nye, Phelps, and Terance Kearns, Program Director of the Youth Center, had a meeting and decided Vigola would not be identified as the person who made allegations against Petitioner because these administrators were concerned that their sources of information would dry up if Petitioner was told. (TR., Volume II, Testimony of Nye, Pages 421, 422.)

6. As part of the investigation conducted by Nye at the request of Phelps, Nye questioned Petitioner as to

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1. "TR." refers to the transcript of Petitioner's Kansas Civil Service hearing. The transcript is included in the record on appeal to the Kansas Court of Appeals.

whether he solicited people to call YCAT. During this interview, Petitioner asked Nye who his accuser was. Nye refused to tell Petitioner who had made the damaging statements against him. (*Id.*)

7. There was a decision by Superintendent Phelps not to provide Petitioner with any specific information concerning the reasons for dismissal. (TR., Volume V, Pages 88, 89.)

8. Consistent with the above decisions, on August 29, 1984, the Superintendent of the Youth Center at Atchison proposed the Petitioner's dismissal. In the proposed dismissal letter, the following reasons for dismissal were listed:

> "a. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidenced by your continued and pervasive unwillingness to cooperate with staff including, but not limited to, the following: K.S.A. 75-2949a(4).
>
> Director of Training and Staff
> Development, YCAA
> Program Director, YCAA
> Director of Youth Services, YCAA
> Director of Education, YCAA
> Chief Psychologist, YCAA
> Chief Social Worker, YCAA
> Other Youth Service Workers
>
> b. Participation in a deliberate action that would seriously disrupt or disturb the normal operation of the Youth Center at Atchison as attested to by another statement. K.S.A. 75-2949b(6).

'Of my own personal knowledge, I received a phone call at my residence on the late afternoon of August 20th. This call came from Mr. Schooler, he was informing me that we were being transferred on September 18th.*

At that time he said he was asking his staff to call YCAT asking for lateral transfers. He stated if enough people call that someone will be saying something to Gene (Supt. Wilson). Then maybe the word will get to Coates and he will attempt to find out what is going on up here.'

*Apparently referring to a Draft Proposal entitled 'Universal Staff Exchange' which was submitted to all HYSWs for their response and evaluation.

c. Personal conduct detrimental to state service which could cause undue disruption of work and endanger the safety of other staff and students K.S.A. 75-2949b(16) (R.,[2] Volume I, Pages 5 and 6.)

9. The proposed dismissal letter offered the Petitioner an opportunity to reply and/or appear at 8:00 a.m. on Tuesday, September 4, 1984, in the office of the Superintendent of the Youth Center at Atchison. (*Id.*)

10. The Petitioner did appear at the meeting as requested in the proposed dismissal letter and prepared a written response to the letter. (R., Volume I, Page 158.) The letter states as follows:

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2. "R." refers to documents in the record on appeal to the Kansas Court of Appeals.

"August 30, 1984

Mr. Mark Phelps
Superintendent
Youth Center at Atchison
Atchison, Kansas 66002

Superintendent Phelps:

I am taking the opportunity to respond in writing, as well as meeting with you on Tuesday, 9-4-84, to the charges leveled against me or reasons for the proposed dismissal.

The first reason listed states:

'for failing to maintain satisfactory and harmonious relationships with fellow and supervisory employees.'

Please note that this aspect of my job duties is covered by my DA 229, and has been for the past 20 months and more. This has been evaluated by Mr. Nye, Dr. Kearns, and yourself as satisfactory on my DA 228.

The exception to this is my evaluation of this relationship with only yourself, Dr. Kerns (Program Director), and Mr. Nye (Director of Youth Services). In this circumstance, my relationship is and has been for the past 20 months, one of defense for the sake of job survival in an atmosphere of harassment and humiliation to accomplish a constructed dismissal.

The second reason listed states:

'for participation in a deliberate action with the intent to disrupting or disturbing the normal operations of the Youth Center at Atchison.'

To substantiate this charge, you offer an unsubstantiated statement, which was supposed to have been made by another youth service worker. Whether this statement was made by malicious intent or otherwise, this is a mis-quote of any conversation I had with anyone, concerning the matter of the Universal Staff Exchange Proposal.

I never stated to anyone, any intent to solicit youth service workers to call the Youth Center at Topeka nor have I done so.

Please see Secretary's Letter 421, which makes available to me a way to resist these types of policies.

Gary Schooler
Youth Service Worker V"

11. After Petitioner's appearance at the meeting, the Superintendent decided to terminate the Petitioner for the same reasons listed in the proposed dismissal letter. (R., Volume I, Pages 7 and 8, Appendix F.)

12. The termination was effective on September 5, 1985. (R., Volume I, Pages 3 and 4.)

13. On September 27, 1984, the Petitioner appealed his termination to the Kansas Civil Service Board as required by Kansas Law and within the time limits prescribed. This was received by the proper authorities on October 1, 1984. (R., Volume I, Page 5.)

14. On October 18, 1984, Petitioner, served on Respondent Department of Social and Rehabilitation Services, and filed with the Kansas Civil Service Board, his first Motion for Summary Judgment. The chief complaint in the first Motion for Summary Judgment was

that Reasons 1 and 3 in the proposed dismissal letter were not proper because they set forth no specific instances of conduct. The Motion for Summary Judgment requested that both Reasons 1 and 3 be stricken from the dismissal letter and Summary Judgment be issued that Reasons 1 and 3 were not specific enough to justify the termination of the Petitioner or that specific instances of noncooperation and personal conduct detrimental to state service be provided. (R., Volume I, Page 12 through 14.)

15. On October 25, 1984, the Petitioner filed his second Motion for Summary Judgment. This Motion for Summary Judgment dealt with Reason 2 of the dismissal letter. Specifically, the Motion complained that, in order for the Petitioner to properly defend the case, he needed to know the name of the individual who made the incriminating statement embodied in Reason 2 of the dismissal letter. This Motion for Summary Judgment requested that either the name of the person making such statement be provided or that Reason 2 be stricken and Summary Judgment be granted that Reason 2 was not specific enough to justify termination under pertinent Kansas statutes. (R., Volume I, Pages 15 through 17.)

16. On November 1, 1984, the Kansas Civil Service Board ruled on Petitioner's first two Motions for Summary Judgment. The Board overruled the Motion for Summary Judgment "because Petitioner was not entitled to judgment as a matter of law from the information submitted". However, the Board did direct that the Department of Social and Rehabilitation Services make known upon request of Petitioner the factual basis upon which they intended to rely at the Petitioner's Civil Service hearing, so that the Petitioner could adequately prepare his case. (R., Volume I, Page 29.)

18. Petitioner requested the "factual reasons" from Respondent Department of Social and Rehabilitation Services in advance of the November 14, 1984, hearing, so that he could prepare his defense and subpoena witnesses. (See letter at R., Volume I, Pages 34 and 35.) The purpose of the hearing set for November 14, 1984, was to discuss subpoena lists. (*Id.*)

19. On November 14, 1984, the State Department of Social and Rehabilitation Services presented a document purporting to be "Factual Basis and Expected Witnesses" to the Petitioner. This consisted of three legal-sized sheets containing various and sundry statements concerning Petitioner's poor performance. It contained few facts but instead broad allegations, and the statement was unsatisfactory as a means for Petitioner to prepare his defense. (R., Volume I, Pages 36 through 38.) The "Factual Basis and Expected Witness" statement is as follows:

> "I. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidence (*sic*) by your unwillingness to cooperate.
>
> A. Failure to cooperate with the overall treatment plan for students by resisting the treatment program, the level system room restriction and other program policies. witness: Bill McDonnell on treatment of
>
> 1. Ronnie Hailes, student Potter.
>
> 2. Dan Davis on treatment plan for Roger Daniels.
>
> 3. Mike Penny on treatment plan of student Standiferd.

4. Mike Driscoll on treatment plan for student Pendergrass.

5. Dr. Kearns on counseling concerning cooperation with treatment plan and policies on restriction and isolation of students.

6. Sam Wheeler on lack of cooperation with school requests for cottage assistance at school and the point system.

7. Gladys Kelly (*sic*) an (*sic*) failure to cooperate with school generally.

8. Connie Crow on Schooler failure to cooperate with trainee program during her training period.

9. Dr. Ray concerning resistance to trainees generally and nature of training program.

B. Failure to cooperate with supervisors in discussing May 1984 student transfer (witnesses: Bob Nye, Mark Phelps, Dr. Kearns, and Mr. Penny).

C. Failure to maintain harmonious relationship (*sic*) fellow staff as evidenced by February, 1984 (*sic*) report of drug use in cottage (witnesses: Sean Flynn, Steve Van Dykes, and Bob Nye).

D. Making repeated derogatory statements concerning other Youth Center Staff in presence of students and other (*sic*) (witnesses: (1) Bob Pepper on comments about Mr. Ross and Mr. Theurer; (2) Millard Allen comments about Mr. Phelps; (3) Glayds (*sic*) Kelly (*sic*) comments about entire clinic staff was 'dumb' and 'needed to be fired'; and comments concerning Terry Kuhnert's lack of ability).

E. Failure to participate in newsletter (witnesses: Nye and Phelps).

F. Failure to respond to request concerning internal recruitment of staff (Nye and Phelps).

2. Encouraging (*sic*) Y.S.W. to call YCAT in Topeka requesting transfer in order to cause disturbances of normal operation (witnesses: M. Allen, Mrs. Roper, Gladys Kelley, Mr. Flynn, Mr. Vigola, Mrs. Vigola, Drs. (*sic*) Kelley, Mr. Flynn, Karla Nolan, Tim Edwards, Sue Watson and K. Ross).

3. Conduct detrimental to state service.

A. Making comments and bragging on campus, around staff and students concerning Legal (*sic*) activities fighting pit bulls (Gladys Kelley, Bill and Pat Pepper, D. Buchanan).

B. Making racial comments concerning the detriment of racial mixing (*sic*) and Blacks as trouble makers (*sic*) within cottage (G. Kelly (*sic*), M. Kelley, M. Allen).

20. On December 5, 1984, arrangements were made among Hearing Examiner Daniel J. Carroll, counsel for Petitioner, and counsel for Respondent to resume the hearing on Mr. Schooler's dismissal on Wednesday, January 9, at 9:00 a.m., and Thursday, January 10, 1985. The December 5, 1984, letter confirmed a November 1, 1984, conversation between the parties. (R., Volume I, Page 38.)

21. On December 7, 1984, Petitioner filed his third Motion for Summary Judgment based on the additional information in the "Factual Basis and Expected Witnesses" statement received by Petitioner at the hearing on November 14, 1984. The bases set forth for Summary Judgment in this Motion were as follows:

a. That the reasons for proposed dismissal set forth in the letter of Mark Phelps dated August 29, 1984, were conclusive of the cause of dismissal and additional reasons could not be given at a later date.

b. That specific reasons for proposed dismissal are required by Due Process and K.S.A. 75-2949 and were not provided.

c. That Reason 2 was insufficient to justify dismissal. (R., Volume I, Pages 40 through 49.)

22. On December 11, 1984, Petitioner wrote a letter, as directed by the Kansas Civil Service Board, to Respondent requesting more specific information about the "Factual Basis and Expected Witnesses" statement for Petitioner's dismissal. After spending three weeks reviewing the information submitted November 14, 1984, it was determined that it was not possible to properly defend the case without more specific information. Thus, it was requested that the date, time, place, persons involved, and other pertinent information be provided for each instance of misconduct. (R., Volume I, Page 53.)

23. On December 17, 1984, Petitioner received a letter from the Department of Social and Rehabilitation Services signed by its attorney refusing to provide any additional information as requested in Petitioner's December 11 letter. (R., Volume 1, Page 55.)

24. On December 20, 1984, the Kansas Civil Service Board informed Petitioner that it had met on December 18, 1984, and discussed the third Motion for Summary Judgment filed by Petitioner. The Board denied the Motion feeling that it could not grant Petitioner judgment as a matter of law from the information submitted. (R., Volume I, Page 65.)

25. On January 9, 1985, the Petitioner's civil service hearing commenced. At that time, the Respondents presented material over the continuing objection of Petitioner's counsel. This information included instances of conduct which now were deemed unacceptable and which occurred over many previous years of Petitioner's employment at the Youth Center at Atchison.

26. At the beginning of the hearing, Petitioner made his fourth Motion for Summary Judgment before the Kansas Civil Service Board, essentially on the same basis as the three prior Motions for Summary Judgment, and also because the additional "facts" were not given Petitioner prior to hearing as ordered by the Board. It was argued in the fourth Motion for Summary Judgment, which was made verbally before the hearing examiner, that at the time the hearing began there was not enough specific information for the Petitioner to adequately prepare his defense. (TR., Volume I, Pages 9, 10, 11, 12, 13, 14.)

27. At that time, the hearing examiner informed Petitioner's counsel that he did not have the authority to grant a dispositive motion. (TR., Volume I, Page 15.)

28. Within the introduction of testimony concerning reasons for Petitioner's dismissal, Petitioner's counsel began to object on the grounds of relevance, because the letter of proposed dismissal was so ambivalent that it did not state any specific reasons for dismissal and because any such testimony would therefore be irrelevant. (TR., Volume I, Page 60.)

29. Petitioner's attorney, in the interest of expediting the hearing process, announced that he would be objecting to all testimony regarding reasons for dismissal, because the letter of proposed dismissal and the letter of dismissal were required by the statute and by the Constitution to

state specific reasons in enough detail to defend, and neither letter contained such specific reasons. (TR., Volume I, Pages 63, 64.) Such objection was continued throughout the hearing for each of Respondents' witnesses.

30. During the hearing, Respondent produced two days of testimony from several witnesses concerning the deficiencies of the Petitioner. With the exception of the incident concerning calls to the Youth Center at Topeka, none of the specific instances related by the testimony were explained in the pre-termination proposed dismissal letter.

31. After the hearing concluded on March 11, 1985, the Kansas Civil Service Board rendered its decision upholding Mr. Schooler's dismissal. The reasons for termination cited by the Board were as follows:

> "The reasons for the Board's action was the testimony of Loval Vigola, Gladys Kelly and Michael Kelly, employees at the Youth Center, that they were contacted by the appellant and asked to inquire at the Youth Center at Topeka about transferring to that institution in an effort to discredit the Superintendent of the Youth Center at Atchison. The reason for this action was a proposed staff exchange policy at the institution. The Board found this communication inappropriate and destructive and made in an effort to disrupt the normal operation of the Youth Center.
>
> The Board also considered the testimony of Bob Pepper, psychologist at the Youth Center, that the appellant made disparaging remarks regarding fellow employees in front of a resident at the Youth Center.

> The Board also considered the testimony of Superintendent Mark Phelps that the appellant failed to discuss perceived problems in counseling sessions, only taking notes. Again, the Board found these actions disruptive to the normal operation of the institution."

The Kansas Civil Service Board also determined that it did not have jurisdiction to rule on Constitutional questions. (R., Volume I, Pages 69-72, Appendix E.)

32. On March 21, 1985, Petitioner filed his Petition for Rehearing before the Kansas Civil Service Board as required by Kansas law. (R., Volume I, Pages 74-105.)

33. On April 1, 1985, Petitioner's Motion for Rehearing was denied. (R., Volume I, Pages 106 and 107, Appendix F.)

34. The Chairman of the Kansas Civil Service Board noted in his dissent to the denial of rehearing that he had considered Petitioner's previous evaluations "which appeared to be more than satisfactory", and that he would have given him a 6 month suspension without pay instead of a termination. (Appendix F.)

35. Petitioner submitted his Petition for Review to the District Court of Shawnee County, Kansas, on April 24, 1985, pursuant to the Kansas Judicial Review Act. K.S.A. 77-601, *et seq.* In his Brief in Support of his Petition for Review, Petitioner argued that, in the context of his case, the provisions of K.S.A. 75-2949 regarding termination of tenured public employees, in order to be interpreted in concert with the Due Process Clause of the Fourteenth Amendment to the United States Constitution, required an impartial decision-maker, an adequate explanation of the evidence, the right to confront

and cross-examine adverse witnesses and adequate time to prepare a defense suited to the nature of the case. In his brief, Petitioner stated as follows:

> "It was established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), that due process requires that a hearing must be done in a meaningful manner to pass muster. If K.S.A. 75-2949 is interpreted so as to justify the activity of Defendants in providing Mr. Schooler an adequate pretermination hearing, then the statute is clearly unconstitutional. Therefore, the proper interpretation of the statute would be that it requires specific reasons for dismissal with an adequate explanation of the evidence, an impartial decision-maker, the right to confront and cross-examine witnesses, and adequate time to prepare a defense suited to the nature of the case. Mr. Schooler's pretermination hearing was clearly inadequate under any reasonable construction of the pertinent Kansas Statutes." (Brief in Support of Petition for Review.)

Also, in his brief, Petitioner raised the issue that he was denied a fair hearing before the Kansas Civil Service Board because a proper bill of particulars was not provided. (Appendix B, Page A9.)

36. The District Court of Shawnee County, Kansas, ruled that under *Loudermill, supra,* the Petitioner was not entitled to an impartial decision-maker or the ability to cross-examine witnesses. (Appendix B, Pages A5, A6.)

37. The District Court of Shawnee County, Kansas, did not address the issue of whether the reasons for dismissal in the proposed dismissal letter provided a Constitutionally adequate explanation of the evidence. The District Court did conclude that the reasons for dis-

missal given in the letter proposing dismissal were statutorily sufficient. (Appendix B, Page A8.) The District Court did not rule on the issue of whether the time given Petitioner to respond to the proposed dismissal letter was adequate. It did rule that the post-termination procedures in front of the Kansas Civil Service Board were adequate under due process standards, even though Petitioner was not given an adequate bill of particulars. (Appendix B, Page A9.) Petitioner's Petition for Review was denied by the District Court of Shawnee County, Kansas, on December 5, 1985.

38. On January 2, 1986, a timely notice of appeal to the Kansas Court of Appeals was filed. The appeal was docketed on January 28, 1986. Petitioner again raised the relevant Constitutional questions in his brief to the Court of Appeals. The brief states in pertinent part:

> "It was established in *Mathew v. Eldridge*, 424 U.S. 319 (1976), that Due Process requires that a hearing must be done in a meaningful manner to pass muster. If K.S.A. 75-2949 is interpreted so as to justify the activity of Defendants/Appellees in providing Mr. Schooler an adequate pre-termination hearing, then the statute is clearly unconstitutional. Therefore, the proper interpretation of the statute would be that it requires specific reasons for dismissal with an adequate explanation of the evidence, an impartial decision-maker, the right to confront and cross-examine witnesses, and adequate time to prepare a defense suited to the nature of the case. Mr. Schooler's pre-termination hearing was clearly inadequate under any reasonable construction of the pertinent Kansas Statutes." (Petitioner's Brief in the Kansas Court of Appeals, Pages 31 and 32.)

39. Petitioner also argued the impropriety respecting Respondents' failure to provide an adequate "bill of particulars". This portion of Petitioner's brief is set forth in Appendix G hereto.

40. The Kansas Court of Appeals specifically affirmed the decision of the District Court of Shawnee County, Kansas, without opinion, on October 16, 1986.

41. These constitutional issues were raised in the Petition for Review to the Kansas Supreme Court. The Petition for Review was denied on December 18, 1986.

REASONS FOR ALLOWING THE WRIT

In this case, the Kansas Court of Appeals upholds the termination of a tenured public employee. It is undisputed that Petitioner had a property right in his employment. It is also undisputed that, prior to termination, the Superintendent of the Youth Center at Atchison and other administrative staff of that institution made a decision that the Petitioner would not be told the name of adverse witnesses or the specifics of the charges against him. It is also undisputed that the Superintendent of the institution solicited and received adverse information concerning Petitioner from all department heads at the institution and that this evidence was never disclosed to the Petitioner prior to termination. It is undisputed that the Superintendent used all of this information in reaching a decision to terminate the Petitioner. It is also clear that the Superintendent was not an impartial decision-maker concerning Petitioner's proposed termination because the Superintendent was a complaining witness. The Superintendent was also not impartial because he based his decision to terminate Petitioner on specific information

which was never disclosed to Petitioner and to which Petitioner could not respond at the pre-termination hearing. Finally, Petitioner was given only a few days in which to respond to the proposed dismissal letter.

Moreover, Respondents refused to provide Petitioner with adequate information prior to the post-termination hearing for him to cross-examine witnesses.

This Court has considered the pre-termination procedures required in dismissing a tenured public employee in a number of cases. Most recently, this Court clearly established that a pre-termination hearing was required in such instances. *Davis v. Scherer,* 468 U.S. 183, 104 S. Ct. 3012, 82 L.Ed.2d 139 (1984); *Loudermill, supra.* In *Loudermill,* it was clearly stated that a tenured public employee was entitled to pre-termination "oral or written notice of the charges against him, an explanation of the employees evidence, and an opportunity to present his side of the story". *Loudermill, supra,* 470 U.S. 546. Before *Loudermill* was decided, the Tenth Circuit Court of Appeals established that in such situation due process requires an impartial tribunal, notice of the charges a reasonable time before the hearing is to take place, and except in emergency situations, a hearing *before* termination becomes effective. *Miller v. City of Mission, Kansas,* 705 F.2d 368, 372 (10th Cir. 1983) (emphasis in original). Since *Loudermill* was decided, the Federal Circuit Court of Appeals has established that an impartial decision-maker is not required at the pre-termination hearing stage. *DeSarno v. Department of Commerce,* 761 F.2d 657 (Fed. Cir. 1985). But in that case, the determination was based on the factual finding that the decision-maker carefully considered the proffered evidence and conducted a full, impartial and independent review of the charges at the pre-termination stage. *DeSarno, supra,* 761 F.2d 660.

In *Loudermill,* this Court leaves open the question of whether, in a case where the facts are in dispute, the employee threatened with dismissal is entitled to cross-examine adverse witnesses at the pre-termination stage. *Loudermill,* 470 U.S. 552 and 553. (Brennen, J., concurring in part, dissenting in part.) In the case of *Walker v. United States,* 744 F.2d 67 (10th Cir. 1984), the Tenth Circuit Court of Appeals concluded that "while not necessary in every case procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood". The Court concluded that the government claimed a dishonesty charge against Walker based on a statement of a former employer, and noted that Walker was unable to determine for himself, and the government would not disclose, who at Walker's place of former employment made the statement. It was held that the allegation was serious enough that Walker should have had a right to confront and cross-examine those who charged him with dishonesty before dismissal.

In *Loudermill,* this Court also leaves open to question the degree of impartiality required of a pre-termination decision-maker. While it may be true that the law does not presume a violation of due process at the pre-termination stage when the "proposing and deciding roles are performed by the same person" (*DeSarno, supra,* 761 F.2d 660), it is equally true that due process is not maintained at the pre-termination stage when the decision-maker intentionally hides the names of the witnesses and other specific facts from the accused employee. Also, given the vagueness of the proposed dismissal letter and the complexity of the underlying factual disputes involved with Petitioner's dismissal, the time given Petitioner to respond, five days over Labor Day weekend, was too short. In *Miller, supra,* the Tenth Circuit requires notice be given

a reasonable time before the hearing. In *Walker, supra,* the Tenth Circuit concluded that a five-day notice was not enough in a case which was far less factually complex.

In this case, the Kansas Court of Appeals upheld a decision of the District Court of Shawnee County, Kansas, without opinion. That decision condoned a process where Petitioner, a tenured public employee, was intentionally denied adequate pre-termination notice of the evidence against him, including the names of witnesses against him, and the opportunity to cross-examine adverse witnesses at the pre-termination stage. No emergency existed and K.S.A. 75-2949(i) would have allowed Respondents to suspend Petitioner with pay while an investigation was being conducted. Also, the official proposing dismissal, who was a key witness against Petitioner and who purposely withheld the specific facts on which Petitioner's proposed dismissal was based, was also the deciding official. K.S.A. 75-2949(b) allows an official proposing dismissal to appoint a representative to conduct the pre-termination meeting in such circumstances. The Kansas Court of Appeals also upheld as adequate, a five-day period, over Labor Day weekend, to respond to the proposed dismissal letter, even given the factually complex situation presented by this case.

The decision of the Kansas Court of Appeals in this case is in conflict with *Loudermill,* in that no explanation of the evidence or adequate opportunity to respond was given Petitioner. It is also in conflict with the decision of the Tenth Circuit Court of Appeals in *Walker, supra,* in that no opportunity for cross-examination of adverse witnesses was allowed at the pre-termination stage. It is in conflict with *Miller, supra,* because the decision-maker, Superintendent Phelps, was clearly so partial that

there was no way Petitioner could have convinced him that termination was not appropriate.

In assessing pre-termination procedures provided for the dismissal of a tenured public employee, the post-termination procedures must be taken into account. *Loudermill,* 470 U.S. 546 and 547. Here, the post-termination procedures did provide an impartial decision-maker and the right to present evidence and to cross-examine witnesses. However, the right of cross-examination was significantly curtailed because of the absolute refusal of Respondents to provide specific information concerning the reasons Petitioner was terminated prior to the hearing. There is no discovery authorized for parties to a Kansas Civil Service hearing. The evidence against Petitioner covered a span of many years, and it was not possible for Petitioner to determine all of the specific incidents which led to his termination. The vagueness of the proposed dismissal letter, the relative vagueness of the "Factual Basis and Expected Witnesses" statement, combined with lack of discovery by which Petitioner could ascertain Respondents' case, rendered investigation impossible with respect to many of Respondents' allegations. In this sense, the entire termination procedure utilized to dismiss Petitioner was inadequate. Petitioner did not receive an adequate explanation of the employer's evidence until the witnesses testified at the post-termination hearing conducted several months after Petitioner's termination. Indeed, the Kansas Civil Service Board relied on testimony not even alluded to in the proposed dismissal letter in upholding Petitioner's dismissal. (Testimony of Phelps, Testimony of Pepper.) This procedure conflicts with the underlying premises of *Loudermill, supra.*

The questions presented by this case are important. They have been the source of conflict among lower courts.

The circumstances under which pre-termination cross-examination of adverse witnesses is required by due process, the degree of impartiality of the decision-maker, the specificity of charges, both at the pre-termination and post-termination stage, and the time given to respond at the pre-termination stage are questions which affect the property rights of public employees in all states. These questions should be finally resolved.

Also, the decision of the Kansas Court of Appeals in this case allows an appointing authority to withhold the evidence, upon which his termination is being proposed, from a tenured public employee at the pre-termination and the post-termination hearings, and is in conflict with the decision of this Court in *Loudermill*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the writ of certiorari be allowed.

Respectfully submitted,

WILLIAM E. METCALF
Counsel of Record
JO LYNNE JUSTUS
METCALF AND JUSTUS
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Attorneys for Petitioner
Gary Schooler

APPENDIX A

NOT DESIGNATED FOR PUBLICATION

No. 59,073

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

GARY SCHOOLER,
Appellant,

v.

ROBERT HARDER, Secretary of Social and Rehabilitation Services, Kansas Department of Social and Rehabilitation Services,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; TERRY L. BULLOCK, judge. Opinion filed October 16, 1986. Affirmed.

William E. Metcalf, of Metcalf and Justus, of Topeka, for the appellant.

Deborah Purce Jones, legal division, Department of Social and Rehabilitation Services, of Topeka, for the appellee.

Before MEYER, P.J., WILLIAM D. CLEMENT, District Judge, assigned, and DANIEL L. HEBERT, District Judge, assigned.

PER CURIAM: Affirmed under Rule 7.042 (b) and (d), 235 Kan. lxxiv.

APPENDIX B

IN THE DISTRICT COURT OF
SHAWNEE COUNTY, KANSAS
SIXTH DIVISION

GARY E. SCHOOLER, Plaintiff,	)	
v.	)	Case No. 85CV545
ROBERT HARDER, SECRETARY SRS, KANSAS DEPARTMENT OF SRS, Defendants.	)	

MEMORANDUM DECISION AND ORDER

The above-entitled matter comes before the Court for decision on the plaintiff's petition for review. Plaintiff has appealed from the decision of March 11, 1985, by the Kansas Civil Service Board which found that the plaintiff's termination from employment at the Youth Center at Atchison (YCAA) was reasonable.

STATEMENT OF FACTS

Plaintiff was hired in August or September of 1972 as a Youth Services Worker at the Youth Center at Atchison (YCAA). After 1980, problems arose which lead to joint meetings between the plaintiff and his supervisor. The concern expressed at these meetings was the plaintiff's relationships with other YCAA em-

ployees. Robert Nye, plaintiff's immediate supervisor counselled the plaintiff on these problems.

On August 28, 1984, a YCAA employee, Loval Vigola, relayed information to Mark Phelps, the Superintendent of YCAA, that the plaintiff Gary Schooler called her at home on August 20, 1984 to solicit her and other employees to seek lateral transfers to the Youth Center at Topeka (YCAT) apparently in order to generate inquiries as to the administration at YCAA. The personnel officer at YCAA called the personnel officer at YCAT to discover if such request for lateral transfers were made. The office at YCAT stated that several calls requesting transfers were received from YCAA employees on Friday, August 24 and Monday, August 27, 1984. Mr. Nye attempted to talk to the plaintiff twice on August 28, 1984, regarding the plaintiff's involvement in the requests for transfers. The plaintiff denied involvement in the scheme.

On August 29, 1984, the Superintendent of YCAT proposed the termination of the plaintiff. Pursuant to K.S.A. 75-2949, plaintiff was sent a proposed dismissal letter, stating the following reasons for the dismissal:

> "a. Failure to maintain satisfactory and harmonious relationships with fellow and supervisory employees as evidenced by your continued and pervasive unwillingness to cooperate with staff . . . [here followed a list of YCAA personnel listed by position].
>
> "b. Participation in a deliberate action that would seriously disrupt or disturb the normal operation of the Youth Center at Atchison as attested by another Youth Service Worker in the following statement . . . [here followed a detailed statement from another employee specifically describing the date and content of the alleged conversation with the plaintiff].

"c. Personal conduct detrimental to state service which could cause undue disruption of work and endanger the safety of other staff and students."

The proposed dismissal letter gave the plaintiff an opportunity to respond to the reasons for termination at a pretermination proceeding to be held on September 4, 1984. Plaintiff attended the meeting on September 4 and presented a written response to the allegations in the proposed dismissal letter. After the hearing, the YCAA superintendent dismissed the plaintiff effective the next day. The plaintiff appealed his termination to the Civil Service Board on September 27, 1984. Prior to the Civil Service hearing, the plaintiff filed four summary judgment motions with the Board; all four motions were denied. After five (5) days of hearings, the Civil Service Board upheld the plaintiff's dismissal and later denied his motion for rehearing.

CONCLUSIONS OF LAW

1. The plaintiff contends that his termination violated due process because he was not given a full adversarial hearing prior to his termination. There is no doubt that the plaintiff had a property interest in his continued employment. This property interest is created by state law through the Kansas Civil Service Act, K.S.A. 75-2925, *et seq.* *Cf. Board of Regents v. Roth*, 408 U.S. 564 (1972); *Goss v. Lopez*, 419 U.S. 565 (1975). Once state law creates such a property interest, the state cannot deprive the individual of the property without due process of law. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

Part of the minimal procedural requirements of due process in civil service employment cases is the right

to a pretermination hearing. *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). In *Loudermill*, the U.S. Supreme Court reasoned that pretermination hearings were necessary for two (2) reasons: (1) because of the significance of the individual's interest in retaining his employment, and (2) because of the need for the employee's "side of the case" in order to reach an appropriate decision. 84 L.Ed.2d at 504.

Plaintiff contends that the requirement of a pretermination hearing entitles him to an impartial hearing officer and the right to cross examine the witnesses testifying against him. Plaintiff's contentions, however, clearly ignore the Supreme Court's discussion in *Loudermill* of the type of pretermination hearing required by due process.

> "[T]he pretermination 'hearing,' though necessary, need not be elaborate. We have pointed out that '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' [citations omitted] In general, 'something' less than a full evidentiary hearing is sufficient prior to adverse administrative action. . . .
>
> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement."

Loudermill, 84 L.Ed.2d at 506.

Clearly, the Supreme Court indicated that an impartial tribunal and the ability to cross examine witnesses were not constitutionally required in all cases. In *De-*

Sarno v. Department of Commerce, 761 F.2d 657, 660 (D.C. Cir. 1985) the Court of Appeals interpreted the *Loudermill* requirements and found that an impartial hearing officer was not required at a pretermination hearing when the employee was protected by full evidentiary proceedings after termination. The authorities cited by the plaintiff are not persuasive since many of these cases deal with due process requirements in post-termination hearings.

Using the due process test of *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), it is the Court's decision that the pretermination hearing under K.S.A. 75-2529, *et seq.* need not be a full evidentiary hearing. Under statutory civil service procedures, a classified employee is given written notice specifying the reasons for his/her termination and an opportunity to respond to those charges. While the employee has an interest in retaining his employment, the state has an interest in "quickly removing an unsatisfactory employee." *Loudermill, supra,* 84 L.Ed. 2d at ..... This is especially true in this case where the care and safety of children are involved. Furthermore, the risk of error is reduced by the employee's opportunity to respond to the charges. The employee is also protected by the right to appeal to an impartial tribunal. In addition, the plaintiff had a full evidentiary hearing before the Civil Service Board with the possible remedy of being reinstated with back pay if his termination was found to be unreasonable. To require a full hearing before termination of a state employee would put a heavy administrative burden on the state which outweighs any benefit received by the employee.

2. Plaintiff's second challenge to his termination is that the defendants failed to comply with K.S.A. 75-2949

which requires a notice of termination "in writing specifically setting forth the reasons therefor." Plaintiff argues that the notice he received did not comply with this specificity requirement.

The Kansas appellate courts have not had an opportunity to interpret this provision of K.S.A. 75-2949 to define the extent of the specificity requirement. The minimum due process requirement of notice has been established as "notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Plaintiff cites *Wade v. Granite City Community Unit School District No. 9*, 218 N.E.2d 19 (Ill. Ct. of App. 1966) as instructive on this issue. In *Wade*, the court held that where a specific reason of dismissal was required, the reason must "fairly appraise the [employee] of the deficiency upon which the [employer] bases its action with sufficient specificity to enable the [employee] to refute the charge." *Id.* at 34.

In reading K.S.A. 75-2949 as a whole, one major reason for the specificity requirement clearly was to give the employee sufficient information to utilize the opportunity to respond to the charges in a meaningful way. Therefore, notice under K.S.A. 75-2949 must be detailed enough to give the employee a reasonable opportunity to know and respond to the charges. After examining the notice of termination and the written response given by the plaintiff at the pretermination hearing, it is clear that the plaintiff had sufficient notice of the first two reasons listed for his termination. The third reason listed for the plaintiff's termination, "conduct detrimental to state service," is somewhat vague since it in no way indicates what type of conduct by the plaintiff was detrimental. Argu-

ably, the third reason is cumulative of the first two reasons. Regardless of the possible vagueness of the third reason, any error was harmless since the evidence presented by the State at the civil service hearing related to the first two reasons in the notice of termination—failure to cooperate and get along with co-employees and participation in an action that would seriously disrupt the normal operation of YCAA.

For the foregoing reasons, the Court finds that the notice received by the plaintiff was specific enough to meet the requirements of K.S.A. 75-2949.

3. The plaintiff also contends that the Civil Service Board erred by allowing irrelevant and prejudicial testimony to be admitted into the hearing. The admission of this evidence, the plaintiff contends, created a bias against the plaintiff and resulted in a long, expensive hearing. Under K.S.A. 75-2929d(F), the Board is not strictly bound by the rules of evidence. However, the written statement of reasons for termination provided for under K.S.A. 2949 are conclusive of the cause of removal. Other reasons for termination cannot later be raised and evidence as to other reasons for dismissal cannot be presented. *Swezey v. State Dep't of Social & Rehabilitation Services,* 1 Kan. App.2d 94, 98, 562 P.2d 117, ... (1977).

After examining the transcript of the hearing and the synopsis of the testimony presented by the plaintiff, the Court finds that the testimony presented by the State at the hearing related to the reasons clearly stated in the proposed dismissal letter—the incident of enticing transfer requests and the plaintiff's inability to maintain satisfactory working relationships with other YCAA personnel. The latter reason was evidenced by testimony of remarks by the plaintiff to other YCAA personnel, testimony regarding the

lack of harmony in the cottage that the plaintiff supervised and a general uncooperative attitude toward various YCAA programs. Even though some of the evidence was obtained by a post-termination investigation, it is still relevant to the reasons for termination stated in the letter. It is clear from the evidence available at the time of the pretermination hearing that there were grounds for the termination. In many situations, the State would not have sufficient time to conduct its entire investigation before pretermination.

4. Plaintiff also argues that he was denied a fair hearing before the Civil Service Board since the State allegedly failed to provide plaintiff with a bill of particulars as ordered by the Board. On or about November 1, 1984, the Board ordered the State to file a bill of particulars so the plaintiff could adequately prepare his case; the Board specifically excluded any of the State's work product from this order. On November 14, 1984, approximately seven (7) weeks before the hearing, the State sent the plaintiff a document entitled "factual basis and expected witness." The document listed the three reasons for termination and gave specific allegations of conduct relating to each reason. In addition, each allegation was accompanied by a list of names of witnesses and a general statement as to what their testimony would be. Plaintiff contends this statement was not specific enough to allow him to adequately prepare for trial. The Court disagrees. The information provided gave plaintiff adequate notice of the charges and apprised him of that which he should prepare to defend. Under the law, that is enough.

5. It is plaintiff's argument that the findings of the Board are not substantially supported by the evidence. Plaintiff bases this contention on his claim that the Board

believed adverse witnesses who personally gained from his termination and disbelieved the plaintiff's witnesses who were disinterested. In review of administrative action, this Court cannot weigh the credibility of testimony presented at the hearing. *Kansas Assoc. of Public Employees v. Public Service Employees Union,* 218 Kan. 509, 512, 544 P.2d 1389 (1976). The Court's duty is to examine all the evidence presented and determine if the Board's decision is substantially supported by that evidence. After reviewing the hearing transcripts, the Court finds that the decision of the Board upholding the plaintiff's termination is substantially supported.

Affirmed.

/s/ Terry L. Bullock
Terry L. Bullock
District Judge

Dated: (Illegible)

cc: William E. Metcalf, Esq.
Deborah Purce Jones, Esq.

(Seal of District Court)

APPENDIX C

IN THE
SUPREME COURT OF THE STATE OF KANSAS

Gary Schooler,	)	
Appellant,	)	
v.	)	No. 86-59073-A
Robert Harder, Secretary SRS,	)	
Kansas Department of SRS,	)	
Appellee.	)	

You are hereby notified of the following action taken in the above entitled case:

PETITION FOR REVIEW.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date December 18, 1986

APPENDIX D

K.S.A. 75-2949(b) as it existed at the time of Petitioner's termination stated as follows:

> (b) Prior to dismissal, demotion or suspension of a permanent employee in the classified service, the appointing authority shall furnish the employee by certified mail, return receipt requested, or by personal delivery, a statement in writing specifically setting forth the reasons therefor. A copy of such statement shall be furnished immediately to the director. This statement shall contain notice of the proposed dismissal, demotion or suspension and shall specify the proposed effective date thereof. Except as otherwise provided in the Kansas civil service act, a proposed suspension, demotion, or dismissal shall become effective no less than three calendar days nor more than 10 calendar days following the date the notice of such proposed suspension, demotion, or dismissal is personally delivered to the employee or deposited with the post office as certified mail. If in the opinion of the appointing authority conditions warrant, the appointing authority may relieve the employee of duties or change the duties of the employee during such period. If the employee is relieved from duty during such period, the employee may be continued in pay status, or placed on leave of absence without pay by the appointing authority. In the statement proposing suspension, demotion or dismissal, the appointing authority shall offer the employee who is proposed to be suspended, demoted or dismissed an opportunity to reply in writing, or appear in person, or both, before the appointing authority or a designated representative of

the appointing authority, on the issue of the proposed suspension, demotion, or dismissal, prior to the time such suspension, demotion, or dismissal is specified by the notice to become effective. The statement shall specify the date, time, and place, by, or at which, the employee may reply in writing or appear, or both.

APPENDIX E

BEFORE THE CIVIL SERVICE BOARD
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF)
GARY E. SCHOOLER)

ORDER

This matter comes on for review this 28th day of February, 1985 on the appeal of Gary E. Schooler from his dismissal from a Youth Service Worker V position at the Youth Center at Atchison.

The matter comes before Chairman Billy S. Sparks and members Glenn Reed, Earl Bartlett and Leo Carvalho. The hearing of this matter took place on January 9, 10, 23, 24 and 25, 1985 before Daniel J. Carroll, hearing examiner for the Board. At the hearing the appellant appeared in person and by counsel William E. Metcalf and Jo Lynn Justus. The respondent appeared by counsel Deborah Purce Jones and Reid Stacey.

After reviewing the transcribed evidence and argument presented at the hearing, and hearing the report of the hearing examiner, the Board finds the action of the appointing authority dismissing the appellant to be reasonable and that the appellant has failed to meet his burden of showing said action to be unreasonable, Chairman Sparks dissenting.

The reasons for the Board's action was the testimony of Loval Vigola, Gladys Kelly and Michael Kelly, employees

at the Youth Center, that they were contacted by the appellant and asked to inquire at the Youth Center at Topeka about transferring to that institution in an effort to discredit the Superintendent of the Youth Center at Atchison. The reason for this action was a proposed staff exchange policy at the institution. The Board found this communication inappropriate and destructive and made in an effort to disrupt the normal operation of the Youth Center.

The Board also considered the testimony of Bob Pepper, psychologist at the Youth Center, that the appellant made disparaging remarks regarding fellow employees in front of a resident at the Youth Center.

The Board also considered the testimony of Superintendent Mark Phelps that the appellant failed to discuss perceived problems in counseling sessions, only taking notes. Again, the Board found these actions disruptive to the normal operation of the institution.

The Board further considered numerous dispositive motions made by the appellant based upon procedural and constitutional irregularities. The Board found the institution complied with the applicable state statutes and that it is without authority to rule on alleged constitutional irregularities. All dispositive motions of the appellant are thus denied.

It Is Therefore Ordered that the action of the appointing authority dismissing the appellant Gary E. Schooler be affirmed.

Chairman Sparks dissents and files the following dissenting opinion:

> "There is no question in my mind, not only from testimony of many witnesses but from the testimony of the appellant, that if the appellant disagreed with

a policy, philosophy, proposal, a rule or regulation, he would not abide by it, would try to get it changed through improper methods and would try to find means to thwart the policy, philosophy, proposal, rule or regulation. I find that at no time was he subject to harassment by his superiors. The alleged harassment was a result of his own actions in trying to thwart the superiors. He likes to make his own rules, doesn't like to follow rules made by others, etc. He is not always a team player.

"However, all of the above generally relates to job performance. Many of the actions complained of by the SRS relate to matters that occurred many, many months ago - and some actions some years ago. These relate to job performance.

"The dismissal can only be based upon the one action taken by appellant with respect to the one proposal in August. There is no question in my mind that the appellant deliberately tried to go around his superiors, deliberately tried to get others to call Topeka, etc. He was asked for input. Instead of merely giving input he violated all standards of proper communications. He again tried to thwart the administration. This is clearly improper.

"As usual, at least so it seems to me, SRS has attempted to base the dismissal on matters other than the one incident. The language used in most of the letter of dismissal includes vague, general matters, not germane or relevant to the actual discharge. The charges (other than the one) are vague and general. Such charges are not only hard to disprove but impossible to even determine what they are based upon. It seems that the SRS just throws in the kitchen

sink as a justification and these extra vague charges obfuscate the real reason for termination.

"The only issues are whether appellant took the actions he is charged with as to the proposed staff exchange policy and what should be the disciplinary action as a result.

"The evidence as to his previous actions in attempting to thwart the administration may be admissible as to assisting the Board in determining the proper type and length of disciplinary action. They are not admissible as substantive matters on the issue of the reasons for termination. In fact, all of those matters are related solely to job performance and he was not discharged for job performance and for low evaluations. But as indicated, some of the evidence can be considered by the Board in considering whether the Board should modify the disciplinary action imposed and to what extent.

"I find that he did act improperly with respect to the proposed staff exchange policy and that his actions require that he be disciplined. In considering what action the Board should take on the appeal, I have examined his evaluations and records and have considered his actions in dealing with policies, philosophies, etc., that he dislikes and his failure to act as a team player.

"I do not believe that his action warrants dismissal. I believe that the action of the appointing authority should have been modified to a six month suspension without pay. I also believe that he should be counseled with respect to his failures to act as a member of the team. I am of the opinion that the appellant no doubt believes that his philosophy, his reluctance

to follow administration's policies, etc. are based upon his personal opinions and that he may have acted in good faith. But he must be a team player. He cannot claim he is being harassed when he is called down for not being a team player. No department can operate properly when one administrator steps out of step. I believe that the State would lose a good employee if he were terminated. However, he should change his attitude in the future.

"Consequently, I feel that a six months suspension without pay would have been proper. - Billy S. Sparks"

Kansas Civil Service Board
By: /s/ Norman Hanson
Norman Hanson
Secretary

DATED: March 11, 1985

APPENDIX F*

BEFORE THE CIVIL SERVICE BOARD
OF THE STATE OF KANSAS

IN THE MATTER OF THE APPEAL OF)
GARY E. SCHOOLER)

We received on March 21, 1985, Mr. Metcalf's application for rehearing of the appeal of Mr. Gary E. Schooler to the State Civil Service Board. The application was referred to the members of the Board. A majority of the Board did not take any action to rehear the case; consequently, under K.S.A. 75-2929e, the application is taken as denied.

Chairman Billy S. Sparks submitted the following statement following his review of the application for rehearing:

"ON MOTION FOR REHEARING

"As previously noted by me, the only reason upon which disciplinary or other action could be taken by the appointing authority would be appellant's actions in soliciting persons to call Y.C.A.T. It seems clear that appellant's actions in that regard were specifically stated by the appointing authority in the letter of dismissal. I found from the evidence that appellant did so solicit and that appellant had failed to sustain

---

*This application for rehearing was denied and was sent to Petitioner on letterhead. A case caption has been added.

his burden of proof that he did not do so. I found such actions did call for disciplinary measures but as noted in my dissent, I would order a suspension for 6 months rather than termination. In making such findings, I disregarded all other items referred to in the letter of proposed dismissal and in the final letter of dismissal and disregarded all testimony not related to his action in soliciting persons to call Y.C.A.T. There is no reason to reconsider or change my findings.

"Under the Board's procedures, although the burden of proof is upon an appellant, the appointing authority involved is generally required to put on evidence to make a prima facie case. It has been felt that the appellant should not have to introduce testimony until after the appointing authority puts on its evidence. Otherwise, the appellant could not properly dispute charges made. The appointing authority may introduce evidence as to its reasons supporting its final decision and the appellant may introduce evidence as to why the Board might modify the decision of the appointing authority. These matters do not necessarily come in by way of rebuttal. Further, where the evidence is introduced before a hearing examiner over a period of days, whether the evidence comes in by way of rebuttal or otherwise makes no difference. The entire record is considered by each member of the Board and it does not matter in what order the evidence is presented where a hearing examiner has been appointed.

"I would not grant a rehearing for any of the reasons stated in the Motion. There is no reason to rehear the matter for the introduction of further evidence.

It appears that ample opportunity was given to appellant to introduce all relevant evidence. I would grant a rehearing only for the purpose of modification, because I believe that the actions taken by appellant did not justify a dismissal but did justify a suspension. In determining what I believe should be the duration of such a suspension, I considered appellant's regular evaluations which appeared to be more than satisfactory (I did not consider the so-called in-house evaluation), his dedication to helping youth, but also took into account his unwillingness at times to act as a team player as evidenced by the point system matter. - Billy S. Sparks"

Sincerely,

/s/ Lloyd W. Woodburn
Lloyd W. Woodburn, Acting
Secretary
State Civil Service Board

LWW:jh

CERTIFIED MAIL, RETURN RECEIPT REQUESTED, FOR METCALF AND JONES

APPENDIX G

In Pertinent Part Petitioner's Brief in the Kansas Court of Appeals reads as Follows:

> "From the time that Plaintiff/Appellant received his proposed letter of dismissal, he attempted to find out the factual basis for his termination. At the early stages, this information was intentionally withheld by Mr. Phelps. Prior to the proposed dismissal letter, Plaintiff/Appellant asked his direct supervisor who his accuser was and this information was withheld at that stage. Mr. Phelps testified that when writing the proposed dismissal letter, he intentionally withheld the name of the adverse witness mentioned in reason Number 2 and purposely did not list specific instances of conduct with respect to reason Number 1. Reason Number 3 of the proposed dismissal letter was not specific at all. The withholding of specific information continued until the witness testified at the Civil Service Hearing. Prior to the hearing, Plaintiff/Appellant had to file two Motions for Summary Judgment to obtain the 'Factual Basis and Expected Witnesses' statement of November 14, 1984. This statement contained broad, general statements and very little specific information about most of the charges against Plaintiff/Appellant there were few references to specific acts or omissions in enough detail, so that the Plaintiff/Appellant could remember the incidents involved. Plaintiff/Appellant attempted to discover specific instances of conduct by writing a letter to Defendants/Appellees on December 11, 1984, pursuant to the Civil Service Board's Order requiring them to provide the factual basis upon which they relied.

This request was refused by letter of December 17, 1984. As a result of this refusal, Plaintiff/Appellant made a Motion for Summary Judgment because Defendants/Appellees did not provide information in sufficient detail for Plaintiff/Appellant to adequately defend against his termination at the Civil Service Hearing. This Motion was not acted upon by the Board until well after the hearing had taken place. As a result, Plaintiff/Appellant could not adequately cross-examine adverse witnesses during the Civil Service Hearing. Plaintiff/Appellant had a right to specific information so that a meaningful hearing could be held. This Motion for Summary Judgment should have been granted." (Petitioner's Brief in the Kansas Court of Appeals, Pages 36 and 37.)